85-706 (1)

Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1985

LOMBARD'S INC., a Florida corporation,
Petitioner,

vs.

PRINCE MANUFACTURING, INC.,
a foreign corporation,
Respondent.

On Petition for a Writ of Certiorari to Review a Judgment of the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

DOES THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S DISMISSAL UNDER RULE 12(B)(6) OF LOMBARD'S ANTITRUST COMPLAINT FOR FAILURE TO IDENTIFY A CO-CONSPIRATOR AND THE DISTRICT COURT'S REFUSAL TO PERMIT ANY DISCOVERY PRIOR TO THE DISMISSAL CONFLICT WITH THIS COURT'S DECISION IN *HOSPITAL BUILDING COMPANY V. TRUSTEES OF REX HOSPITAL*, 425 U.S. 738, 96 S.CT. 1848, 48 L.ED. 2D 338 (1976) AND WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *LITTLEJOHN V. SHELL OIL COMPANY*, 456 F.2D 225 (5TH CIR. 1972) AND THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT *IN INVESTMENT PROPERTIES INTERNATIONAL, INC. V. IOS, LTD.*, 459 F.2D 705 (2D CIR. 1972)?

II

DOES THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S DISMISSAL UNDER RULE 12(B)(6) OF LOMBARD'S ANTITRUST COMPLAINT FOR FAILURE TO IDENTIFY A CO-CONSPIRATOR AND THE DISTRICT COURT'S REFUSAL TO PERMIT ANY DISCOVERY PRIOR TO THE DISMISSAL

CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *SALTER V. UPJOHN COMPANY*, 593 F.2D 649 (5TH CIR. 1979)?

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On Petition for a Writ of Certiorari to Review a Judgment of the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, LOMBARD'S INC., respectfully prays that this Court issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on February 21, 1985.

REPORTED OPINONS RENDERED IN THE COURTS BELOW

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Lombard's Inc. v. Prince Manufacturing, Inc., 753 F.2d 974 (11th Cir.), *reh. denied*, ____ F.2d ____ (1985).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Lombard's Inc. v. Prince Manufacturing, Inc., 583 F.Supp. 1572 (S.D.Fla. 1984).

STATEMENT OF JURISDICTION

On February 21, 1985, the United States Court of Appeals for the Eleventh Circuit issued its decision in Consolidated Case Nos. 84-5547 and 85-5660, *Lombard's Inc. v. Prince Manufacturing, Inc.*, 753 F.2d 974 (11th Cir. 1985). (Appendix A)

LOMBARD'S INC. filed a timely petition for rehearing and for rehearing en banc with the Clerk of the Court of Appeals. On May 30, 1985, the Court of Appeals denied the petition for rehearing. ____ F.2d ____, (11th Cir. 1985). (Appendix B)

LOMBARD'S INC., on August 14, 1985, applied for an extension of time within which to petition for certiorari. On August 21, 1985, this Court, by the Honorable Justice Powell, entered an order extending the time within which to petition up to October 27, 1985. (No. A-144).

The statutory provision which confers on this Court jurisdiction to review the above-described decision of the Court of Appeals for the Eleventh Circuit by writ of certiorari is Section 1254 (1) of Title 28, United States Code.

STATUTORY PROVISIONS

The following statutes are quoted in Appendix H:

Section 1254 of Title 28, United States Code, 28 U.S.C. s. 1254.

Sherman Antitrust Act, s. 1, 26 Stat. 209, as amended, 15 U.S.C. s. 1 (1976).

Clayton Antitrust Act, ss. 4 and 16, 38 Stat. 731, as amended, 15 U.S.C. ss. 15 and 26 (1976).

STATEMENT OF THE CASE

I.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

A. Course of Proceedinqs and Dispositions in the District Court and Court of Appeals

LOMBARD'S INC. ("LOMBARD"), on February 21, 1984, brought suit in the United States District Court for the Southern District of Florida, Miami Division, against PRINCE MANUFACTURING INC. ("PRINCE") and its corporate parent, Chesebrough-Pond's Inc. The complaint alleged a violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. s. 1, and sought injunctive relief and treble damages under Section 4 of the Clayton Act, as amended, 15 U.S.C. s. 15.

The District Court, on May 3, 1984, dismissed the complaint for failure to state a claim upon which relief could be granted and dismissed the action. LOMBARD, on May 8, 1984, moved to vacate the dismissal of the action and for leave to file an amended complaint against PRINCE alone. On May 31, 1984, the District Court granted LOMBARD's motion, directing PRINCE to respond within twenty (20) days.

PRINCE, on July 5, 1984, moved to dismiss LOMBARD's amended complaint. On July 17, 1984, LOMBARD filed its memorandum of law in opposition to PRINCE's motion to dismiss the amended complaint. The District Court, on July 18, 1984, entered an order dismissing the amended complaint for failure to state a claim upon which relief could be granted. (Appendix C)

LOMBARD, on July 19, 1984, appealed the July 18, 1984, dismissal order of the District Court to the Court of Appeals for the Eleventh Circuit. On August 10, 1984, LOMBARD moved in the District Court pursuant to Rule 27(b), Federal Rules of Civil Procedure, for leave to take the depositions of two non-party witnesses in order to preserve their testimony during the pendency of the appeal before the Eleventh Circuit. The District Court, on August 14, 1984, denied LOMBARD's Rule 27(b) motion. LOMBARD, on August 17, 1984, appealed the August 14, 1984, order of the District Court. Thereafter, the appeals were consolidated. The Court of Appeals, on February 21, 1985, issued its decision in *Lombard's, Inc. v. Prince Manufacturing, Inc.*, 753 F.2d 974 (11th Cir. 1985), affirming the District Court's judgment of dismissal and its order denying LOMBARD's Rule 27(b) motion.

LOMBARD, on March 6, 1985, filed a petition for rehearing and suggestion for rehearing en banc.[1] The Court of Appeals, on May 30, 1985, denied the petition for rehearing. (Appendix B)

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[1]On March 7, 1985, LOMBARD, pursuant to Rule 60(b)(2), Federal Rules of Civil Procedure, moved for relief from the judgment of dismissal in the District Court (Appendix G), and moved to withhold ruling on the petition for rehearing in the Court of Appeals. The Court of Appeals granted the motion to withhold adjudication for a period of 60 days from March 18, 1985. The District Court, on May 17, 1985, entered an order denying LOMBARD's motion for relief of judgment. LOMBARD, on May 31, 1985, filed a timely notice of appeal of the May 17, 1985, order denying LOMBARD's motion for relief from the judgment of dismissal. That appeal has been assigned Case No. 85-5469 and is pending in the Court of Appeals.

B. Statement of the Facts

1. The Amended Complaint

Invoking Section 1 of the Sherman Act, 15 U.S.C. s. 1, the Amended Complaint challenged an attempt on the part of PRINCE, acting in concert with its retail competitors, to unlawfully prevent LOMBARD from engaging in the interstate, discount priced, mail order and wholesale distribution of tennis racquets manufactured by PRINCE. The amended complaint sought to preserve a significant aspect of LOMBARD's business operations from destruction at the hands of an unlawful conspiracy to fix resale prices.[2]

The amended complaint tracked the claim for relief asserted in *Monsanto Company v. Spray-Rite Service Corporation*, ____ U.S. ____ , 104 S.Ct. 1464 (1984).[3] It

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[2]Attempts to restrict intrabrand price competition through prohibitions of mail order distribution have been challenged under the Sherman Act. *E.g., O.S.C. Corp. v. Apple Computer, Inc.*, 601 F.Supp. 1274 (C.D.Cal. 1985), and *Computer Place Inc. v. Hewlett-Packard Company*, 607 F.Supp. 822 (N.D.Cal. 1984). Each of those cases involved federal antitrust assaults upon prohibitions of mail order distribution of computer equipment. Summary judgment was granted in each case in favor of the defendants, but only after extensive pretrial discovery.

[3]*Monsanto, supra*, involved an alleged price-fixing conspiracy between a manufacturer and its dealers/distributors to eliminate a discount competitor. This Court, in *Monsanto*, reviewed the standard of proof required to establish concerted action between a manufacturer and its dealers. *Monsanto* held that in order to establish concerted action, something more than evidence of complaints is necessary, that there must be evidence which tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. ____ U.S. at ____, 104 S.Ct. at 1471, ____ L.Ed.2d at ____.

alleged that PRINCE had conspired, and was then conspiring, with LOMBARD's retail competitors to fix the resale (retail) prices of tennis racquets manufactured by PRINCE. (Appendix D) Excerpts from the Amended Complaint follow:

> "2. LOMBARD's is a corporation organized and existing under the laws of the State of Florida. It maintains its principal place of business in Dade County, Florida. LOMBARD's is engaged in the business of retail, wholesale and mail order sales of sporting goods, including tennis racquets.
>
> "3. PRINCE is a foreign corporation with its principal place of business located in Princeton, New Jersey. PRINCE is engaged in the business of manufacturing sporting goods, including tennis racquets, and is found and transacts substantial business in the Southern District of Florida.
>
> "4. As further set forth in the succeeding portions of this amended complaint, upon information and belief, PRINCE, together and with PRINCE dealers and others at this time unknown to LOMBARD's, have engaged, and are now engaging, in an unlawful combination and conspiracy to fix the resale prices of PRINCE tennis racquets and to restrain interstate trade and commerce, in violation of Section 1 of the Sherman Act.
>
> "5. LOMBARD's operates two (2) retail establishments at which it sells sporting goods, including tennis racquets, to the general public.

One (1) such retail establishment is located in Dade County, Florida, and the other retail establishment is located in Broward County, Florida. In addition, LOMBARD's operates a mail order business in Dade County, Florida, in which it makes retail sales of sporting goods, including tennis racquets, to customers throughout the United States. Finally, LOMBARD's sells sporting goods, including tennis racquets, to several mass merchandisers which, in turn, sell those sporting goods, including tennis racquets, to retail customers throughout the United States. LOMBARD's for many years has sold sporting goods, including tennis racquets, at prices significantly below those suggested by the manufacturers of such sporting goods.

"6. PRINCE is engaged in the business of manufacturing sporting goods, including tennis racquets, which are sold throughout the world. Because of its superior design and market skills, PRINCE has achieved a commanding position in the sporting goods field, particularly in the highly profitable market for so-called 'oversized' tennis racquets.

"7. For several years, LOMBARD's has purchased large quantities of tennis racquets from PRINCE for resale in LOMBARD's retail, wholesale, and mail order business operations. The importance to LOMBARD's of its tennis racquets manufactured by PRINCE has grown over the last several years to the point where LOMBARD's generates a substantial portion

of its profits from sales of such tennis racquets. If LOMBARD's were to find itself unable to sell the tennis racquets manufactured by PRINCE, the ability of LOMBARD's to survive would be severely jeopardized.

"8. Effective January, 1984, PRINCE introduced two (2) new tennis racquets to the public. The first such tennis racquet, named the 'Prince Precision Graphite', is being offered and sold to dealers, such as LOMBARD's, at a price of $80.00 each, with a suggested retail price of $135.00 each. The second such tennis racquet, named the 'Prince J/R Pro', is being offered and sold to dealers, such as LOMBARD's, at a price of $29.50 each, with a suggested retail price of $49.50 each. In March, 1984, PRINCE introduced a third new tennis racquet to the public. The third such tennis racquet is named the 'Prince Magnesium Pro'.

"9. PRINCE has asked LOMBARD's to enter into a written agreement, a copy of which is attached hereto as Exhibit 'A', whereby LOMBARD's would contractually bind itself to make no sales of the 'Prince Precision Graphite' tennis racquet and/or the 'Prince J/R Pro' tennis racquet and/or the 'Prince Magnesium Pro' tennis racquet other than through the retail establishments operated by LOMBARD's. The clear purpose of the proposed written agreement is to prevent LOMBARD's from selling the specified tennis racquets through the mail order and/or wholesale operations of

LOMBARD's. LOMBARD's has refused to sign the proposed written agreement and PRINCE has refused to fill written and/or verbal purchase orders for the three (3) new tennis racquets submitted by LOMBARD's solely because LOMBARD's has refused to sign the proposed written agreement.

"10. Upon information and belief, PRINCE, together and with PRINCE dealers and others at this time unknown to LOMBARD's, conspired to maintain the resale prices of the 'Prince Precision Graphite', the 'Prince J/R Pro', and the 'Prince Magnesium Pro' tennis racquets and terminate pricecutters. In furtherance of that conspiracy, and in response to dealer complaints, PRINCE has prevented LOMBARD's from making wholesale and mail order sales of the three (3) new tennis racquets by refusing to fill LOMBARD's purchase orders for these new tennis racquets.

"11. Upon information and belief, PRINCE, together and with PRINCE dealers and others at this time unknown to LOMBARD's, have attempted, and are now attempting, to prevent LOMBARD's from making wholesale and mail order sales of the 'Prince Precision Graphite', the 'Prince J/R Pro' and the 'Prince Magnesium Pro' tennis racquets not to achieve any legitimate business objectives, but for the sole purpose of unlawfully preventing LOMBARD's from engaging in intrabrand price competition with other dealers in those same tennis racquets.

"12. LOMBARD's has already suffered great injury to its business, good will, reputation and relationship with past and future customers because it has been unable to purchase from PRINCE the 'Prince Precision Graphite', the 'Prince J/R Pro' and the 'Prince Magnesium Pro' tennis racquets on terms and conditions which do not violate Section 1 of the Sherman Act. Should LOMBARD's, in the future, be unable to purchase from PRINCE the 'Prince Precision Graphite', the 'Prince J/R Pro' and the 'Prince Magnesium Pro' tennis racquets on terms and conditions which do not violate Section 1 of the Sherman Act, it will suffer additional injury to its business, good will, reputation and relationship with past and future customers. The public has already been harmed and will, in the future, continue to be harmed, by the above-described unlawful policies and practices of PRINCE because competition throughout the United States will be suppressed or eliminated.

"13. As a direct result of the above-described unlawful acts by PRINCE, LOMBARD's has already suffered, and will continue to suffer, substantial damages.

* * *

"15. LOMBARD's demands trial by jury of all issues so triable."

2. The Course of Discovery

An understanding of the District Court's discovery rulings during the pendency of the litigation below is essential to this Court's determination of the questions presented for review.

Simultaneously with the filing of its complaint, LOMBARD propounded written interrogatories to PRINCE and requested PRINCE to produce and permit the inspection and copying of specified documents. In so doing, LOMBARD sought from PRINCE information about communications between PRINCE and LOMBARD's retail competitors concerning the marketing of tennis racquets manufactured by PRINCE.

PRINCE and Chesebrough-Pond's, Inc., on April 2, 1984, moved for a stay of pretrial discovery pending a ruling on their motion to dismiss the complaint. LOMBARD, on April 19, 1984, moved to compel answers to written interrogatories and the production of documents, which motion was opposed by the Defendants on April 30, 1984. The District Court never ruled on the foregoing motions and PRINCE never responded to LOMBARD's discovery requests.

On June 28, 1984, after LOMBARD's had filed the amended complaint but before PRINCE had filed its motion to dismiss, two factory sales representatives of PRINCE, Mr. John Brocksmith and Ms. Ana L. April, met with three employees of LOMBARD at LOMBARD's executive offices in North Miami Beach, Florida. As evidenced by the sworn affidavits of Messrs. Bernard Lombard (Appendix E) and Mitchell M. Lombard (Appendix F), Mr. Brocksmith and Ms. April stated

that PRINCE's prohibition of the mail order and wholesale distribution of its tennis racquets was the result of complaints from LOMBARD'S retail competitors who objected to LOMBARD'S discount pricing policies and practices. Further, Ms. April informed Mr. Mitchell M. Lombard that she had in her possession copies of letters of complaint from LOMBARD'S retail competitors to PRINCE. LOMBARD, on June 29, 1984, filed and served its notice of the taking of Ms. April's deposition examination on July 9, 1984. Thereafter, Ms. April was personally served with a subpoena duces tecum for deposition which commanded her to bring with her to the July 9, 1984, deposition examination the documents which, according to Mr. Mitchell M. Lombard's affidavit, she had admitted to having in her possession.

PRINCE, on July 5, 1984, moved to dismiss LOMBARD's amended complaint under Rule 12(b)(6), Federal Rules of Civil Procedure. On July 6, 1984, PRINCE moved for an order under Rule 26(c), Federal Rules of Civil Procedure, cancelling Ms. April's scheduled July 9, 1984, deposition examination.

Ms. April did not appear on July 9, 1984, for her scheduled deposition examination. *Without waiting for a reply from LOMBARD, the District Court, on July 16, 1984, granted PRINCE's motion for a protective order as to Ms. April's deposition examination pending the issuanceof a ruling on PRINCE's motion to dismiss LOMBARD's amended complaint.*

LOMBARD, on July 17, 1984, moved for an order citing Ms. April in contempt by reason of her unexcused failure to appear on July 9, 1984, for deposition

examination. Further on July 17, 1984, LOMBARD moved for an order imposing sanctions against PRINCE and PRINCE's counsel for having induced Ms. April to defy a lawful subpoena duces tecum for deposition. Finally, LOMBARD, on July 17, 1984, filed its memorandum of law in opposition PRINCE's motions to dismiss the amended complaint and for a protective order as to Ms. April's deposition. Attached to the July 17, 1984, memorandum of law were the July 9, 1984, affidavits of Messrs. Bernard Lombard and Mitchell M. Lombard. On July 18, 1984, the District Court entered its order dismissing the amended complaint.

B. Basis for Federal Jurisdiction in the District Court

The action in the District Court sought treble damages and injunctive relief as a result of the Defendant's alleged violations of Section 1 of the Sherman Act, 15 U.S.C. s. 1. Federal jurisdiction in the District Court was based upon 15 U.S.C. ss. 15 and 26.

ARGUMENT

I

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S DISMISSAL UNDER RULE 12(B)(6) OF LOMBARD'S ANTITRUST COMPLAINT FOR FAILURE TO IDENTIFY A CO-CONSPIRATOR AND THE DISTRICT COURT'S REFUSAL TO PERMIT ANY DISCOVERY PRIOR TO THE DISMISSAL CONFLICTS WITH THIS COURT'S DECISION IN *HOSPITAL BUILDING COMPANY V. TRUSTEES OF REX HOSPITAL*, 425 U.S. 738, 96 S.CT. 1848, 48 L.ED.2D 338 (1976), WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *LITTLEJOHN V. SHELL OIL COMPANY*, 456 F.2D 225 (5TH CIR. 1972), AND WITH THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN *INVESTMENT PROPERTIES INTERNATIONAL, INC. V. IOS, LTD.*, 459 F.2D 705 (2D CIR. 1972).

This Petition for Certiorari brings up for review a radical departure on the part of the Court of Appeals from two fundamental principles of federal civil practice and procedure: that notice pleading is all that is required of a federal litigant to state claim upon which relief can be granted, and that a federal litigant should be accorded an opportunity to conduct discovery prior to a summary dismissal of his claim.

The decision of the Court of Appeals in *Lombard's Inc. v. Prince Manufacturing, Inc., supra*, has seriously undermined those principles, as previously established by this Court in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) and *Poller v. Columbia Broadcasting*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed. 2d 458 (1962), respectively, and their progeny. Certiorari review by this Court is required to correct the confusion created by the decision of the Court of Appeals in *Lombard's Inc. v. Prince Manufacturing, Inc.*, which, *inter alia*, imposed a more stringent standard of pleading in the context of a Sherman Antitrust price-fixing conspiracy claim.

A.

The decision of the Court of Appeals in *Lombard's, Inc. v. Prince Manufacturing, Inc.*, conflicts with the decision of this Court in *Hospital Building Company v. Trustees of Rex Hospital*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976), a case in which the very same pleading and discovery standards which are the subject of this Petition coalesced and were applied by this Court in reversing a summary dismissal of a conspiracy action under the Sherman Act. In *Trustees of Rex Hospital, supra*, this Court reviewed a dismissal under Rule 12(b)(6), Federal Rules of Civil Procedure, of a Sherman Act conspiracy claim, for failure to adequately allege a "substantial effect" on interstate commerce. In deciding whether the complaint stated a claim upon which relief could be granted, this Court stated:

> "We have held that 'a complaint should not be dismissed for failure to state a claim unless

it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957) (footnote omitted). And in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' *Poller v. Columbia Broadcasting*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458, 464 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. Applying this concededly rigorous standard, we conclude that the instant case is not one in which dismissal should have been granted. Petitioner's complaint states a claim upon which relief can be granted under the Sherman Act. 426 U.S. at 746-747.

The Court of Appeals, in its panel decision of February 21, 1985, emphasized that LOMBARD's amended complaint failed to identify any of alleged co-conspirators:

> "The present claim states only a conclusory allegation that there was a conspiracy in violation of the Sherman Act. Prince is the only defendant named in the amended complaint and paragraphs 10 and 11 identify 'only PRINCE dealers and others at this time unknown to LOMBARD'S' as Prince's co-conspirators. *Thus not only are no facts alleged to demonstrate the conspiracy but the specific participants of the conspiracy are not even identified.*" 753 F.2d at 975. (emphasis supplied)

In so holding, the Court of Appeals articulated the following standard:

> " . . . Notice pleading is all that is required for a valid antitrust complaint. *Quality Foods v. Latin American Agribusiness Development Corp.*, 711 F.2d 989, 995 (11th Cir.1983). Under notice pleading the complaint need only ' "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." ' *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.2d 80, 85 (1957)). *Nevertheless, "enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified." Id.* See also *City of Gainesville v. Florida Power & Light Co.*, 488 F.Supp. 1258, 1263 (S.D.Fla.1980)." (emphasis supplied)

The standard articulated by the Court of Appeals in *Lombard's Inc. v. Prince Manufacturing, Inc., supra*, however, is a more stringent standard than the standard set out in *Conley v. Gibson, supra*, and its application by the Court of Appeals constitutes a radical departure from the prior holdings of this Court.[4] The Court of Appeals merely paid "lip service" to *Conley v. Gibson*

[4]The standard applied in *Lombard's Inc., supra*, was first announced by the Eleventh Circuit in the leading case in that Circuit on the sufficiency of pleading an antitrust claim, *Quality Foods v. Latin American Agribusiness Development Corp., supra*, 711 F.2d at 995. Unlike its decision in *Lombard's Inc.*, the Court of Appeals in *Quality Foods*, reversed the summary dismissal and remanded the cause for further proceedings.

and to Rule 8, Federal Rules of Civil Procedure,[5] and created the new standard that "enough data must be pleaded so that each element of the alleged antitrust violation can be identified." Such a standard of pleading conflicts with this Court's formulation of the standard in *Conley v. Gibson* that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46, 78 S.Ct. at 102, 2 L.Ed.2d at 84.

There is nothing unique about an antitrust claim which would require a higher standard of pleading than that which has been required by the federal courts since *Conley v. Gibson, supra.* To allow the decision of the Court of Appeals in *Lombard's Inc. v. Prince Manufacturing, Inc.* to stand would be to endorse the erroneous notion that a more rigorous standard of pleading is required in civil antitrust litigation than in other types of federal civil litigation.

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[5]Rule 8, Federal Rules of Civil Procedure, provides in pertinent part:

> "(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

B.

The Court of Appeals also held that there had been no abuse of discretion in the District Court's refusal to allow LOMBARD to take the deposition of Ana L. April, the non-party witness who knew the identities of the alleged co-conspirators, and who presumably could provide detailed information about the alleged conspiracy. That second holding of the Court of Appeals clearly conflicts with the "rigorous standard" set out by this Court in *Poller v. Columbia Broadcasting, supra*, and applied by this Court in reviewing the summary dismissal of the antitrust claim in *Trustees of Rex Hospital, supra*.

The decision of the Court of Appeals additionally conflicts with the decisions of the Court of Appeals for the Fifth Circuit in *Littlejohn v. Shell Oil Company*, 456 F.2d 225 (5th Cir. 1972), *vacated on other grounds*, 483 F.2d 1140 (5th Cir., *en banc*, 1973), *cert. denied*, 414 U.S. 1116, 94 S.Ct. 849 (1973) and with *Investment Properties International, Inc. v. IOS, Ltd.*, 459 F.2d 705 (2d Cir. 1972).

In *Littlejohn v. Shell Oil Company, supra*, the district court entered summary judgment for the defendants in an action for damages under the Robinson-Patman Act and the plaintiff appealed. The Fifth Circuit, in an opinion written by Judge Simpson, reversed. Judge Simpson's majority opinion stated:

> "Consequently, we hold that the district court erred in granting the defendants' motions for summary judgment before the plaintiff had been afforded the opportunity to utilize discovery

to develop basic jurisdictional facts from the data solely within the defendants' possession."

* * *

"In reversing the judgment of the district court, we express or imply no opinion whatsoever with respect to the merits of the case. We simply hold that the district court acted prematurely in foreclosing the plaintiff from further discovery regarding the interstate aspects of the defendants' operations, from the only meaningful source of such discovery, the defendants' records." 456 F.2d at 229.

Judge Simpson's majority opinion for the Fifth Circuit's panel in *Littlejohn v. Shell Oil Company, supra,* was approvingly cited by the Second Circuit in *Investment Properties International, Inc. v. IOS, Ltd., supra. Investment Properties International* was an action for alleged violations of the federal securities and antitrust laws. The district court, expressing doubts about its subject matter jurisdiction, denied the plaintiffs' motions for a preliminary injunction. Thereafter, the plaintiffs served a notice of taking the depositions of certain named officers of the defendant and its subsidiaries, the examination to be limited to the threshold issues of standing and jurisdiction. The defendants obtained an order under Rule 26(c), Federal Rules of Civil Procedure, vacating the deposition notice pending the district court's determination of its subject matter jurisdiction. The plaintiffs then petitioned the Court of Appeals for a writ of mandamus. In an opinion written by Judge Oakes, the Second Circuit issued the writ:

> "Judge Bonsal clearly had the power to vacate plaintiffs-petitioners' notices of deposition. Fed.R.Civ.P. 26(c)(1). Nevertheless, the issue here is one of first impression, and the vacation reveals, through its consequences an abuse of discretion. *Discovery here, furthermore, is not a matter of mere 'housekeeping' . . . but is the heart of the controversy, for on it turns plaintiffs-petitioners' right to be in court.* The order below makes it virtually impossible to discover the facts on which jurisdiction and standing turn, and thus puts the plaintiffs-petitioners in a cul-de-sac which the Federal Rules never contemplated. (Citation omitted) (emphasis supplied) 459 F.2d at 707.

The inherent unfairness of the "cul-de-sac" created by a tandem dismissal for failure to state a claim and a refusal to permit discovery is singularly illustrated in the course of the proceedings below. From the inception of its lawsuit against PRINCE, LOMBARD sought to obtain evidence from PRINCE of the price-fixing conspiracy of which LOMBARD complained. Such evidence would obviously not be forthcoming from LOMBARD's retail competitors: (1) those retail competitors had no interest in seeing LOMBARD prevail in its antitrust action against PRINCE; and (2) those retail competitors were not at all anxious to provide LOMBARD with information which might result in their being named as additional defendants in the pending Sherman Act litigation. The arbitrary entry of the protective order by the District Court, immediately followed by the summary dismissal, precluded LOMBARD from obtaining from the non-party deponent, Ms. April, the very factual information which the District Court

asserted was lacking in the amended complaint.[6] Such result could not have been contemplated by the Federal Rules of Civil Procedure.

II

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S DISMISSAL UNDER RULE 12(B)(6) OF LOMBARD'S ANTITRUST COMPLAINT FOR FAILURE TO IDENTIFY A CO-CONSPIRATOR AND THE DISTRICT COURT'S REFUSAL TO PERMIT ANY DISCOVERY PRIOR TO THE DISMISSAL CONFLICTS WITH THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IN *SALTER V. UPJOHN COMPANY*, 593 F.2D 649 (5TH CIR. 1979).

In *Salter v. Upjohn Company*, 593 F.2d 649 (5th Cir. 1979), the Fifth Circuit reviewed the District Court's issuance of a protective order vacating a notice of taking deposition.[7] Judge Thornberry's opinion for the Fifth Circuit set out the following standard:

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[6]It was only after the Court of Appeals affirmed the dismissal that the identity of one of the co-conspirators was discovered by LOMBARD, presumably because the retail competitor who made the disclosure believed that the litigation had terminated. Even then, the District Court denied LOMBARD's Rule 60(b)(2) motion for relief from the judgment of dismissal, which appears at Appendix G.

[7]Legal commentators have viewed orders blocking deposition examinations as being exceptional. Professors Wright and Miller, in their treatise *Federal Practice and Procedure*, state:

"It is very unusual for a court to prohibit the taking of a deposition altogether and *absent extraordinary circumstances, such an order would likely be in error.* (emphasis supplied) 593 F.2d at 651.

(Footnote 7 Continued)

"Rule 26(c)(1) permits a court to order that the discovery requested not be had. such orders are not exceptional with regard to interrogatories and requests to produce, since when those discovery devices are used the court can readily determine whether there is a need for protection against a particular interrogation or production of a particular document. Even with regard to these devices the comments of Judge John W. Oliver are pertinent:

> Experience has further established that counsel of the competence of counsel engaged in this case rarely find it necessary to resort to motions for protective orders because both sides recognize that the question presented is not whether documentary data is going to be ordered produced, but when, how, and in what form, such production will be ordered.

"It is even more difficult to show grounds for ordering that discovery not be had when it is a deposition that is sought, and most requests of this kind are denied. Since the notice for taking a deposition is not required to specify the subject matter of the examination, the need for protection usually cannot be determined before the examination begins, and the moving party can be adequately protected by making a motion under Rule 30(d) if any need for protection appears during the course of the examination." (Footnote omitted) Volume 8, s.2037, pp. 271-272.

The opinion of the Court of Appeals in *Lombard's Inc. v. Prince, supra*, receded from the "extraordinary circumstances" standard adopted by the Fifth Circuit in *Salter, supra*,[8] and reverted to a simple "abuse of discretion" standard:

> "The trial's court exercise of discretion regarding discovery orders will be sustained absent a finding of abuse of discretion. . . . Accordingly we find no abuse of discretion." (Citations omitted) 753 F.2d at 976.

In a footnote, Judge Godbold's opinion for the Eleventh Circuit sought to reconcile the holding below with the Fifth Circuit's decision in *Salter, supra*, stating:

> "*Salter v. Upjohn Company*, 593 F.2d 649, 651 (5th Cir.1979) refers to a requirement of extraordinary circumstances to deny the taking of a deposition. We do not consider that it states a different standard than the accepted abuse of discretion standard." *Id.*

The view taken by the Court of Appeals minimizes the legal import of the *Salter* doctrine. The abuse of discretion standard, as applied to discovery orders in general, does not address the requirement of extraordinary circumstances to deny the taking of a

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[8]Fifth Circuit decisions handed down prior to October 1, 1981, are binding precedent upon the Eleventh Circuit, unless reversed by the Eleventh Circuit sitting *en banc. Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

deposition which the Fifth Circuit carved out from the general rule in *Salter, supra.*[9]

The District Court's protective order preventing LOMBARD from taking the deposition of Ms. April, a non-party witness who had knowledge of dealer complaints to PRINCE and who had correspondence from dealers in her possession, was followed two days later by a dismissal order which faulted LOMBARD's amended complaint for its failure to identify any co-conspirator. It is evident that the protective order was intended to serve as a permanent prohibition of the taking of Ms. April's examination. No "extraordinary circumstances" appeared in the record for such a permanent prohibition. The Court of Appeals' refusal to apply the *Salter* "extraordinary circumstances" standard warrants plenary review of the judgment below by this Court.

CONCLUSION

This Petition presents an ideal opportunity for this Court to clarify the standard of pleading which is applicable to a claim of a conspiracy to fix prices in violation of Section 1 of the Sherman Antitrust Act. The decision of the Eleventh Circuit in *Lombard's Inc. v. Prince Manufacturing, Inc., supra,* required a level of

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[9]In holding that the applicable standard was that of abuse of discretion, the Court of Appeals relied on its prior decision in *Commercial Union Ins. Co. v. Westrope*, 730 F.2d 729, (11th Cir. 1984). The Court in *Commercial Union Ins. Co. v. Westrope, supra*, however, merely held that the district court had not abused its discretion in denying a motion to compel the further deposition examination of a party deponent on matters as to which the witness had refused to testify.

pleading specificity in civil antitrust conspiracy cases which is significantly more than that required by Rule 8, Federal Rules of Civil Procedure, and the decisions of this Court in *Conley v. Gibson, supra, Poller v. Columbia Broadcasting, supra,* and *Trustees of Rex Hospital, supra.*

The decision of the Court of Appeals is objectionable not only because it required an unrealistic level of pleading specificity for an antitrust conspiracy, but also because, in tandem, it sanctioned a complete nullification of the discovery process and prevented LOMBARD's from obtaining the very factual information which would have "cured" its amended complaint. The combined effect of these two holdings of the Court of Appeals was to create a "cul-de-sac" from which LOMBARD's could not escape. In an antitrust setting, where "the proof is largely in the hands of the alleged conspirators," *Poller v. Columbia Broadcasting,* 368 U.S. at 473, 82 S.Ct. at 491, 7 L.Ed.2d at 464, there is no justification for a "cul-de-sac" dismissal such as the one sanctioned by the Court of Appeals in *Lombard's Inc. v. Prince Manufacturing, Inc., supra.*

WHEREFORE, LOMBARD, respectfully prays that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted this 24th day of October, 1985.

LAWRENCE R. METSCH

LYDIA A. FERNANDEZ

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for certiorari was hand-delivered to Alan G. Greer, Esq., and Scott D. Sheftall, Esq., Floyd Pearson Richman Greer Weil Zack & Brumbaugh, P.A., Attorneys for PRINCE, Twenty-Fifth Floor, One Biscayne Tower, 2 South Biscayne Blvd., Miami, Florida 33131-1868, this ____ day of October, 1985.

LAWRENCE R. METSCH

Appendix

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NOS. 84-5547, 84-5660

LOMBARD'S INC.,
Plaintiff-Appellant,

vs.

PRINCE MANUFACTURING, INC.,
Defendant-Appellee.

OPINION

Appeals from the United States District
Court for the Southern District of Florida

Before GODBOLD, Chief Judge,
KRAVITCH and HATCHETT, Circuit Judges.

GODBOLD, Chief Judge:

This is a consolidated appeal of the trial court's dismissal of Lombard's amended complaint for failure to state a claim upon which relief can be granted and denial of Lombard's motion for leave to depose two party witnesses pending appeal. We affirm.

The relevant paragraphs of Lombard's amended complaint provide:

"10. Upon information and belief, PRINCE, together with PRINCE dealers and others at

this time unknown to LOMBARD'S, conspired to maintain the resale prices of the 'Prince Precision Graphite,' the 'Prince J/R Pro' and the 'Prince Magnesium Pro' tennis racquets and terminate price-cutters. In furtherance of that conspiracy, and in response to dealer complaints, PRINCE has prevented LOMBARD'S from making wholesale and mail order sales of the three (3) new tennis racquets by refusing to fill LOMBARD'S purchase orders for these new tennis racquets.

"11. Upon information and belief, PRINCE, together and with PRINCE dealers and others at this time unknown to LOMBARD'S, have attempted, and are now attempting, to prevent LOMBARD'S from making wholesale and mail order sales of the 'Prince Precision Graphite,' the 'Prince J/R Pro' and the 'Prince Magnesium Pro' tennis racquets not to achieve any legitimate business objectives, but for the sole purpose of unlawfully preventing LOMBARD'S from engaging in intrabrand price competition with other dealers in those same tennis racquets."

1 Rec. at 106-07.

These allegations are insufficient to state a claim upon which relief can be granted. Notice pleading is all that is required for a valid antitrust complaint. *Quality Foods v. Latin American Agribusiness Development Corp.*, 711 F.2d 989, 995 (11th Cir. 1983). Under notice pleading the complaint need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rest." Id. (quoting *Conley v. Gibson*, 355

U.S. 41, 47 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957)). Nevertheless, "enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified." Id. Conclusory allegations will not survive a motion to dismiss if not supported by the facts constituting a legitimate claim for relief." Id. *See also, City of Gainesville v. Florida Power & Light Co.*, 488 F.Supp. 1258, 1253 (S.D.Fla. 1980).

The present claim states only a conclusory allegation that there was a conspiracy in violation of the Sherman Act. Prince is the only defendant named in the amended complaint, and paragraphs 10 and 11 identify only "PRINCE dealers and others at this time unknown to LOMBARD'S" as Prince's co-conspirators. Thus not only are no facts alleged to demonstrate the conspiracy but the specific participants of the conspiracy are not even identified. Such pleading is inadequate to give the defendant fair notice of Lombard's claim. *Cf. Quinonez v. National Association of Securities Dealers, Inc.*, 540 F.2d 824, 826-28 (5th Cir. 1976). A conclusory allegation of conspiracy to restrain trade will not survive a motion to dismiss. *Larry R. George Sales Company v. Cool Attic Corp.*, 587 F.2d 266, 273-74 (5th Cir. 1979); *City of Gainesville*, 488 F.Supp. at 1263.

Nor did the district court err when it granted Prince's motion to dismiss before Lombard's was able to depose a non-party witness. On June 29, 1984 Lombard's filed and served notice of the taking of Ana April's deposition on July 9, 1984. On July 5, 1984 Prince moved to dismiss Lombard's amended complaint. The next day Prince moved for a protective order under Fed.R.Civ.P. 26(c) canceling April's scheduled deposition. April did not appear on July 9, and on July 16 the court

granted Prince's motion for a protective order. On July 18, 1984 the district court issued an order dismissing the amended complaint.

The trial court's exercise of discretion regarding discovery orders will be sustained absent a finding of an abuse of that discretion, *Commercial Union Insurance Company v. Westrope*, 730 F.2d 729, 731 (11th Cir. 1984); *Wood v. McEwen*, 644 F.2d 797, 801-02 (9th Cir. 1981), *cert. denied*, 455 U.S. 942, 102 S.Ct. 1437, 71 L.Ed.2d 654 (1982); *Chrysler Corporation v. Fedders Corporation*, 643 F.2d 1229, 1240 (6th Cir.), *cert. denied*, 454 U.S. 843, 102 S.Ct. 388, 70 L.Ed.2d 207 (1981); *B.R.S. Land Investors v. United States*, 596 F.2d 353, 356 (9th Cir. 1979).[10] *Compare, Quality Foods v. Latin American Agribusiness Development Corporation*, 711 F.2d 989, 995-96 (11th Cir. 1983). Accordingly we find no abuse of discretion. April and a second witness pending appeal under Fed.R.Civ.P. 27(b). Under Rule 27(b) the court "may" allow the perpetuation of testimony pending appeal where it is "proper to avoid a failure or delay of justice." Lombard's motion alleges only that the two witnesses were not "immune from the uncertainties of life (and death)" and that Lombard's was genuinely concerned that the documents in April's possession could be destroyed. Thus unlike *Texaco, Inc. v. Borda*, 383 F.2d 607, 609 (3d Cir. 1967) where the *Inc. v. Borda*, 383 F.2d 607, 609 (3d Cir. 1967) where the witness was 71 years old and the events to be testified

[10]*Salter v. Upjohn Company*, 593 F.2d 649, 651 (5th Cir. 1979), refers to a requirement of extraordinary circumstances to deny the taking of a deposition. We do not consider that it states a different standard than the accepted abuse of discretion standard.

to had occurred 11 years earlier, Lombard's "makes almost no attempt to show why the requested testimony must be perpetuated." *Ash v. Cort*, 512 F.2d 909, 913 (3d Cir 1975) (cited in *In re Eisenberg*, 654 F.2d 1107, 1111 (5th Cir. 1981) (Unit B)). *See also Rose v. McNamara*, 375 F.2d 924, 925 & n. 2 (D.C. Cir.), *cert. denied*, 389 U.S. 856, 88 S.Ct. 70, 19 L.Ed.2d 121 (1967).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NOs. 84-5547; 84-5660

LOMBARD'S, INC.,
Plaintiff-Appellant,

versus

PRINCE MANUFACTURING INC.
AND CHESEBROUGH-POND'S INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 21, 11 Cir., 1985, ____ F.2d ____).
(May 30, 1985)

Before GODBOLD, Chief Judge, KRAVITCH and HATCHETT, Circuit Judges PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
/s/ JOHN C. GODBOLD

_____
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-465-CIV-JLK

LOMBARD'S INC., etc.,

Plaintiff,

vs.

PRINCE MANUFACTURING, INC., etc.,

Defendant.

ORDER GRANTING MOTION TO DISMISS AMENDED COMPLAINT

THIS CAUSE comes before the court upon the defendant's Motion to Dismiss Amended Complaint.

In the original complaint the plaintiff alleged that the defendant Prince Manufacturing, Inc., and Prince's parent corporation, Cheesbrough-Pond's, Inc., had conspired to restrain trade in violation of the Sherman Act, 15 U.S.C. ss. 1 and 3. The proffered Amended Complaint is filed only against Prince Manufacturing, Inc., and makes no mention of the parent corporation. The Amended Complaint alleges that the sole defendant, Prince, has conspired with "Prince dealers and others at this time unknown" to fix resale prices of Prince tennis racquets and to restrain interstate trade and commerce.

In *Quality Foods v. Latin Am. Agribusiness Devel.*, 711 F.2d 989 (11th Cir. 1983), the Eleventh Circuit Court of Appeals explained the standard for pleading an antitrust claim:

> Because of the liberal pleading requirements of the Federal Rules, rarely will a motion to dismiss for failure to state a claim be granted. Indeed, such a motion should not be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' . . . This is particularly true in an antitrust suit where the proof and details of the alleged conspiracy are largely in the hands of the alleged co-conspirators. . . . Hence the Supreme Court has indicated that a complaint should not be dismissed unless it is found to be 'wholly frivolous.'
>
> This is not to say that liberal pleading requirements negate the need to draft an antitrust complaint in a careful and thoughtful fashion. An antitrust complaint 'must comprehend a so-called prima facie case,' . . . and enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified. . . . Conclusory allegations that defendant violated the antitrust laws and plaintiff was injured thereby will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief. . . . However, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent.

711 F.2d at 995 (citations omitted).

In *City of Gainesville v. Florida Power & Light Co.*, 488 F.Supp. 1258 (S.D. Fla. 1980), relied upon by

the Court of Appeals in *Quality Foods*, this court found the following language failed to state a claim:

> Upon information and belief, Cities have engaged in an unlawful combination and conspiracy among themselves and with others for the purpose of causing injury to FPL's business and property. The means employed by the Cities in furtherance of this combination and conspiracy have included . . . the commencement of numerous proceedings, including this litigation, against FPL for the specific purpose, and with the specific intent, of coercing and harrassing FPL into agreeing to demands made by the Cities of FPL.

488 F.Supp. at 1266.

That language is, in fact, much closer to stating a claim than the Amended Complaint now before the court. At least in *City of Gainesville* the claim alleged that specific entities had each done some act in furtherance of a conspiracy. In the present case, all that has been alleged is that Prince has committed a unilateral act in furtherance of a conspiracy with unknown persons.

The unilateral act performed by Prince is alleged to have been motivated by dealer complaints but who made those complaints and what the content of the complaints was is not alleged. Further, as stated by the United States Supreme Court in *Monsanto Co. v. Spray-Rite Service Corp.*, 52 U.S.L.W. 4341 (20 Mar. 1984), previously cited by this plaintiff:

> [To] permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of independent business judgment and emasculate the terms of the statute.

52 U.S.L.W. at 4344.

This court explained in its order of 3 May, 1984, that Monsanto addressed the sufficiency of the evidence and not the sufficiency of the complaint, but it is pertinent now to explain that manufacturer reaction to dealer complaints is not necessarily improper. In the present complaint, the plaintiff has only alleged that the defendant manufacturer, Prince, has reacted to dealer complaints. However, the plaintiff has not stated with whom Prince is to have conspired nor has the plaintiff alleged when the conspiratorial agreement was entered into nor the terms of that agreement. In fact, all that the plaintiff has alleged is that Prince has conspired with someone and that Prince's refusal to sell racquets to the plaintiff is in furtherance of that conspiracy. Like the allegations of the original complaint, the conclusory allegations of the Amended Complaint are not sufficient to state a claim as required by rule 8 of the Federal Rules of Civil Procedure.

For these reasons, the court does:

ORDER and ADJUDGE that the defendant Prince Manufacturing's Motion to Dismiss Amended Complaint be, and it is, GRANTED. The Amended Complaint is DISMISSED.

DONE and ORDERED in chambers at the United States Courthouse, Miami, Dade County, Florida this 18th day of July, 1984.

JAMES LAWRENCE KING
U.S. DISTRICT JUDGE

cc: Lawrence R. Metsch, Esq.
Scott D. Sheftall, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 84-0465-CIV-JLK

LOMBARD'S INC., a Florida corporation,
Plaintiff,

vs.

PRINCE MANUFACTURING INC.,
a foreign corporation,
Defendant.

AMENDED COMPLAINT

Plaintiff LOMBARD'S INC. ("LOMBARD'S") sues Defendant PRINCE MANUFACTURING INC. ("PRINCE") and alleges the following:

JURISDICTION

1. This is a complaint for treble damages and injunctive relief under the antitrust laws of the United States, 15 U.S.C. s. 1, et seq. This Court has jurisdiction of this action under 15 U.S.C. ss. 15 and 26 and the action is brought as a result of the Defendant's violations of Section 1 of the Sherman Act, 15 U.S.C. s. 1.

THE PARTIES

2. LOMBARD'S is a corporation organized and existing under the laws of the State of Florida. It maintains its principal place of business in Dade County, Southern District, Florida. LOMBARD'S is engaged in the business of retail, wholesale and mail order sales of sporting goods, including tennis racquets.

3. PRINCE is a foreign corporation with its principal place of business located in Princeton, New Jersey. PRINCE is engaged in the business of manufacturing sporting goods, including tennis racquets, and is found and transacts substantial business in the Southern District of Florida.

4. As further set forth in the succeeding portions of this amended complaint, upon information and belief, PRINCE, together and with PRINCE dealers and others at this time unknown to LOMBARD'S, have engaged, and are now engaging, in an unlawful combination and conspiracy to fix the resale prices of PRINCE tennis racquets and to restrain interstate trade and commerce, in violation of Section 1 of the Sherman Act.

THE FACTS

5. LOMBARD'S operates two (2) retail establishments at which it sells sporting goods, including tennis racquets, to the general public. One (1) such retail establishment is located in Dade County, Florida, and the other retail establishment is located in Broward County, Florida. In addition, LOMBARD'S operates a mail order business in Dade County, Florida, in which

it makes retail sales of sporting goods, including tennis racquets, to customers throughout the United States. Finally, LOMBARD'S sells sporting goods, including tennis racquets, to several mass merchandisers which, in turn, sell those sporting goods, including tennis racquets, to retail customers throughout the United States. LOMBARD'S for many years has sold sporting goods, including tennis racquets, at prices significantly below those suggested by the manufacturers of such sporting goods.

6. PRINCE is engaged in the business of manufacturing sporting goods, including tennis racquets, which are sold throughout the world. Because of its superior design and market skills, PRINCE has achieved a commanding position in the sporting goods field, particularly in the highly profitable market for so-called "oversized" tennis racquets.

7. For several years, LOMBARD'S has purchased large quantities of tennis racquets from PRINCE for resale in LOMBARD'S retail, wholesale and mail order business operations. The importance to LOMBARD'S of its tennis racquets manufactured by PRINCE has grown over the last several years to the point where LOMBARD'S generates a substantial portion of its profits from sales of such tennis racquets. If LOMBARD'S were to find itself unable to sell the tennis racquets manufactured by PRINCE, the ability of LOMBARD'S to survive would be severely jeopardized.

8. Effective January, 1984, PRINCE introduced two (2) new tennis racquets to the public. The first such tennis racquet, named the "Prince Precision Graphite," is being offered and sold to dealers, such as LOMBARD'S,

at a price of $80.00 each, with a suggested retail price of $135.00 each. The second such tennis racquet, named the "Prince J/R Pro," is being offered and sold to dealers, such as LOMBARD'S, at a price of $29.50 each, with a suggested retail price of $49.50 each. In March, 1984, PRINCE introduced a third new tennis racquet to the public. The third such tennis racquet is named the "Prince Magnesium Pro."

9. PRINCE has asked LOMBARD'S to enter into a written agreement, a copy of which is attached hereto as Exhibit "A", whereby LOMBARD'S would contractually bind itself to make no sales of the "Prince Precision Graphite" tennis racquet and/or the "Prince J/R Pro" tennis racquet and/or the "Prince Magnesium Pro" tennis racquet other than through the retail establishments operated by LOMBARD'S. The clear purpose of the proposed written agreement is to prevent LOMBARD'S from selling the specified tennis racquets through the mail order and/or wholesale operations of LOMBARD'S. LOMBARD'S has refused to sign the proposed written agreement and PRINCE has refused to fill written and/or verbal purchase orders for the three (3) new tennis racquets submitted by LOMBARD'S solely because LOMBARD'S has refused to sign the proposed written agreement.

10. Upon information and belief, PRINCE, together and with PRINCE dealers and others at this time unknown to LOMBARD'S, conspired to maintain the resale prices of the "Prince Precision Graphite," the "Prince J/R Pro" and the "Prince Magnesium Pro" tennis racquets and terminate price-cutters. In furtherance of that conspiracy, and in response to dealer complaints, PRINCE has prevented LOMBARD'S from making

wholesale and mail order sales of the three (3) new tennis racquets by refusing to fill LOMBARD'S purchase orders for these new tennis racquets.

11. Upon information and belief, PRINCE, together and with PRINCE dealers and others at this time unknown to LOMBARD'S, have attempted, and are now attempting, to prevent LOMBARD'S from making wholesale and mail order sales of the "Prince Precision Graphite," the "Prince J/R Pro" and the "Prince Magnesium Pro" tennis racquets not to achieve any legitimate business objectives, but for the sole purpose of unlawfully preventing LOMBARD'S from engaging in intrabrand price competition with other dealers in those same tennis racquets.

12. LOMBARD'S has already suffered great injury to its business, good will, reputation, and relationship with past and future customers because it has been unable to purchase from PRINCE the "Prince Precision Graphite," the "Prince J/R Pro" and the "Prince Magnesium Pro" tennis racquets on terms and conditions which do not violate Section 1 of the Sherman Act. Should LOMBARD'S, in the future, be unable to purchase from PRINCE the "Prince Precision Graphite," the "Prince J/R Pro" and the "Prince Magnesium Pro" tennis racquets on terms and conditions which do not violate Section 1 of the Sherman Act, it will suffer additional injury to its business, good will, reputation and relationship with past and future customers. The public has already been harmed and will, in the future, continue to be harmed, by the above-described unlawful policies and practices of PRINCE because competition throughout the United States will be suppressed or eliminated.

13. As a direct result of the above-described unlawful acts by PRINCE, LOMBARD'S has already suffered, and will continue to suffer, substantial damages.

14. LOMBARD'S has no adequate remedy at law.

15. LOMBARD'S demands trial by jury of all issues so triable.

WHEREFORE, LOMBARD'S prays:

A. That a preliminary and permanent injunction issue restraining PRINCE from conditioning its sales of the "Prince Precision Graphite" and/or the "Prince J/R Pro" and/or the "Prince Magnesium Pro" tennis racquets to LOMBARD'S upon the execution by LOMBARD'S of the proposed agreement, a copy of which is attached hereto as Exhibit "A".

B. That a preliminary and permanent injunction issue retraining PRINCE from in any manner restricting or limiting their sales of the "Prince Precision Graphite," the "Prince J/R Pro" and/or the "Prince Magnesium Pro" tennis racquets to LOMBARD'S for reasons or motives which violate Section 1 of the Sherman Act.

C. That LOMBARD'S recover from PRINCE treble damages, plus costs and counsel fees.

D. That LOMBARD'S have such further and other relief as is just and proper.

HAUSER AND METSCH, P.A.
Attorneys for LOMBARD'S
Suite 1070
4770 Biscayne Blvd.
Miami, Florida 33137-3237
(305) 576-1177

By: _____
LAWRENCE R. METSCH

By: _____
LYDIA A. FERNANDEZ

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was delivered to Alan G. Greer, Esq., and Scott D. Sheftall, Esq., Floyd Pearson Stewart Richman Greer Weil & Zack, P.A., Attorneys for PRINCE, One Biscayne Tower, 25th Floor, Miami, Florida 33131-1868 this _____ day of May, 1984.

_____
LYDIA A. FERNANDEZ

Exhibit "A"

PRINCE PRECISION GRAPHITE AND J/R PRO RETAIL AGREEMENT

Retailer: _____

_____

_____

_____

The above named retailer ("Retailer") hereby makes application to Prince Manufacturing, Inc. ("Prince") to become an authorized retailer of Prince's Prince Precision Graphite and Prince J/R Pro tennis racquets. In this regard, Retailer represents and agrees as follows:

1. Retailer maintains a retail store open on a regular basis to members of the public, or maintains a tennis pro shop open on a regular or seasonal basis to members of the public and/or members of an affiliated club, in each case for the transaction of retail business in tennis equipment over the counter.

2. Retailer has qualified personnel available to advise customers as to the concept underlying the Prince "full-size" racquet, including the special advantages of its unique construction, and as to the proper selection of racquets, grip size, strings and string tension. Retailer also has facilities or arrangements available for the stringing of racquets and may maintain a supply of demonstration racquets for use by customers.

3. Any Prince Precision Graphite or J/R Pro racquets sold by Prince to Retailer will be resold only over the counter to retail customers who have physically come to the retail store or pro shop.

4. Retailer, prior to any such resale, will, through qualified personnel, offer such customer the opportunity to feel the heft of a Prince racquet, provide advice in person to the Prince concept, an appropriate grip size, string and string tension and make such retail customer aware of the availability, if applicable, of a demonstration Prince Precision Graphite or J/R Pro racquet for trial.

5. Retailer understands Prince believes that the good will of tennis players towards Prince can depend in part upon their understanding of the concept behind the "full-size" Prince racquet, their purchase of a racquet as best suited to their game as will result from the personal advice of qualified personnel and trial, including the feel of the heft and light weight of the Prince racquet, before purchase.

6. Retailer also understands that a friendly and personal response to any customer complaint can play an important role in maintaining good will. Retailer will therefore encourage complaining customers to bring racquets to Retailer first for possible minor service or for assistance in returning racquets to Prince for warranty handling.

7. Retailer understands that if this application is approved and Prince commences selling Prince Precision Graphite and/or Prince J/R Pro racquets to Retailer, such sales may be discontinued at any time for Retailers

failure to observe the commitments made above, failure to meet credit requirements or other business or promotional goals of Prince, or because Prince determines to discontinue business generally with Retailer.

_____

Retailer

Application Approved: _____

Sales Representative

_____

Vice President
Prince Manufacturing, Inc.

_____

Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-0465-CIV-JLK

LOMBARD'S INC.,
a Florida corporation,

Plaintiff,

vs.

PRINCE MANUFACTURING INC.,
a foreign corporation,

Defendant.

AFFIDAVIT OF BERNARD LOMBARD

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

I, BERNARD LOMBARD, having personally appeared before the undersigned Notary Public, do on my oath depose and state that:

1. I am a resident of Dade County, Southern District, Florida.

2. I am the Secretary/Treasurer and a Director of Lombard's Inc., the Plaintiff in the above-styled lawsuit.

3. I make this affidavit on personal knowledge.

4. Mr. Jack Brocksmith, operating through an enterprise known as Tennis Sales South, is the Southeastern Regional Factory Sales Representative for Prince Manufacturing Inc., the Defendant in the above-styled lawsuit. Mr. Brocksmith's business office is located at 2315 Brockett Road, Tucker, Georgia 33084. Mr. Brocksmith and his enterprise, Tennis Sales South, are responsible for the sales to Plaintiff of the tennis racquets manufactured by Defendant.

5. Ms. Ana L. April, who resides at 10410 S.W. 76th Street, Miami, Florida 33173, is employed by Mr. Brocksmith and Tennis Sales South as a salesperson. In that employment capacity, Ms. April is responsible for the sales, in Broward and Dade Counties, Florida, of tennis racquets manufactured by Defendant. One of Ms. April's sales accounts is that of Plaintiff.

6. Mr. Mitchell M. Lombard is my son and the Vice-President and a Director of Plaintiff.

7. Neither Mr. Brocksmith nor Ms. April is employed by Defendant.

8. Ms. Jane Waterbury is employed by Plaintiff.

9. On June 28, 1984, commencing at 12:30 p.m., my son, Ms. Waterbury and I met with Mr. Brocksmith and Ms. April. That meeting began in Plaintiff's executive office, located at 1840 N.E. 164th Street, North Miami Beach, Florida, and continued at the Wag's Restaurant, located at 1785 N.E. 163rd Street, North Miami Beach, Florida. During the course of that meeting, Mr. Brocksmith stated that he wished that Plaintiff would cooperate on

pricing with Defendant. Mr. Brocksmith further stated that the delays which had recently occurred with respect to the shipment of Defendant's tennis racquets to Plaintiff were linked to Plaintiff's discount pricing policies and practices and that such shipping delays would come to an end if Plaintiff would raise its retail prices for tennis racquets manufactured by Defendants. In addition, Mr. Brocksmith stated that Defendant's policy of barring mail order sales of its new tennis racquet lines had been formulated in response to numerous complaints from Plaintiff's retail competitors about Plaintiff's discount pricing policies and practices. Mr. Brocksmith also asserted that Defendant's sales were up 125% from the prior year, but that Plaintiff's sales of tennis racquets manufactured by Defendant would decline from $1,200,000.00 in 1983 to $500,000.00 in 1984 because of shipping delays and Defendant's refusals to fill Plaintiff's purchase orders, both of which were directly linked to Plaintiff's discount pricing policies and practices. Finally, Mr. Brocksmith stated that Defendant had found itself caught in a dispute between Plaintiff and Plaintiff's retail competitors and that Defendant had decided to be the "good guys" in the eyes of Plaintiff's retail competitors.

BERNARD LOMBARD

Personally appeared before me, the undersigned Notary Public, BERNARD LOMBARD, known by me to be the same, who on his oath executed the foregoing affidavit this 9th day of July, 1984, at North Miami Beach, Dade County, Southern District, Florida.

_____

Notary Public

My commission expires:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-0465-CIV-JLK

LOMBARD'S INC.,
a Florida corporation,

Plaintiff,

vs.

PRINCE MANUFACTURING
INC., a foreign corporation,

Defendant.

AFFIDAVIT OF MITCHELL M. LOMBARD

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

I, MITCHELL M. LOMBARD, having personally appeared before the undersigned Notary Public, do on my oath depose and state that:

1. I am a resident of Broward County, Southern District, Florida.

2. I am the Vice-President and a Director of Lombard's Inc., the Plaintiff in the above-styled lawsuit.

3. I make this affidavit on personal knowledge.

4. Mr. Jack Brocksmith, operating through an enterprise known as Tennis Sales South, is the Southeastern Regional Factory Sales Representative for Prince Manufacturing Inc., the Defendant in the above-styled lawsuit. Mr. Brocksmith's business office is located at 2315 Brockett Road, Tucker, Georgia 33084. Mr. Brocksmith and his enterprise, Tennis Sales South, are responsible for the sales to Plaintiff of the tennis racquets manufactured by Defendant.

5. Ms. Ana L. April, who resides at 10410 S.W. 76th Street, Miami, Florida 33173, is employed by Mr. Brocksmith and Tennis Sales South as a salesperson. In that employment capacity, Ms. April is responsible for the sales, in Broward and Dade Counties, Florida, of tennis racquets manufactured by Defendant. One of Ms. April's sales accounts is that of Plaintiff.

6. Mr. Bernard Lombard is my father and a resident of Dade County, Florida. Mr. Bernard Lombard is the Secretary/ Treasurer and a Director of Plaintiff.

7. Neither Mr. Brocksmith nor Ms. April is employed by Defendant.

8. Ms. Jane Waterbury is employed by Plaintiff.

9. On June 28, 1984, commencing at 12:30 p.m., my father, Ms. Waterbury and I met with Mr. Brocksmith and Ms. April. That meeting began in Plaintiff's executive office, located at 1840 N.E. 164th Street, North Miami Beach, Florida, and continued at the Wag's Restaurant, located at 1785 N.E. 163rd Street, North Miami Beach, Florida. During the course of that meeting, Mr. Brocksmith stated that he wished that Plaintiff would cooperate on

pricing with Defendant. Mr. Brocksmith further stated that the delays which had recently occurred with respect to the shipment of Defendant's tennis racquets to Plaintiff were linked to Plaintiff's discount pricing policies and practices and that such shipping delays would come to an end if Plaintiff would raise its retail prices for tennis racquets manufactured by Defendants. In addition, Mr. Brocksmith stated that Defendant's policy of barring mail order sales of its new tennis racquet lines had been formulated in response to numerous complaints from Plaintiff's retail competitors about Plaintiff's discount pricing policies and practices. Mr. Brocksmith also asserted that Defendant's sales were up 125% from the prior year, but that Plaintiff's sales of tennis racquets manufactured by Defendant would decline from $1,200,000.00 in 1983 to $500,000.00 in 1984 because of shipping delays and Defendant's refusals to fill Plaintiff's purchase orders, both of which were directly linked to Plaintiff's discount pricing policies and practices. Finally, Mr. Brocksmith stated that Defendant had found itself caught in a dispute between Plaintiff and Plaintiff's retail competitors and that Defendant had decided to be the "good guys" in the eyes of Plaintiff's retail competitors.

10. After the conclusion of the meeting described in the foregoing paragraph of this affidavit, I had a separate and private conversation with Ms. April. Ms. April told me that she had in her possession several letters written by Plaintiff's retail competitors to Defendant complaining about Plaintiff's discount pricing policies and practices.

11. Immediately after the meetings described in the foregoing paragraphs of this affidavit, I telephonically contacted Plaintiff's attorney in this lawsuit, Mr. Lawrence R. Metsch, and related to him what had transpired on those meetings.

MITCHELL M. LOMBARD

Personally appeared before me, the undersigned Notary Public, MITCHELL M. LOMBARD, known by me to be the same, who on his oath executed the foregoing affidavit this 9th day of July, 1984, at North Miami Beach, Dade County, Southern District, Florida.

Notary Public

My commission expires:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 84-465-CIV-JLK

LOMBARD'S INC.,
a Florida corporation,

Plaintiff,

vs.

PRINCE MANUFACTURING
INC., a foreign corporation,

Defendant.

PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT OF DISMISSAL AND SUPPORTING MEMORANDUM OF LAW

Plaintiff LOMBARD'S INC. ("LOMBARD'S"), by and through its undersigned attorneys and pursuant to Rule 60(b), Federal Rules of Civil Procedure[11], respectfully moves for the issuance of an order affording LOMBARD'S

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[11]Rule 60(b), Federal Rules of Civil Procedure, provides:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due

relief from the July 18, 1984, judgment of dismissal entered in the above-styled lawsuit.[12] In support of this motion, LOMBARD'S would respectfully show the Court that it now possesses "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)" within the meaning of Rule 60(b)(2), Federal Rules of Civil Procedure.

(Footnote 11 Continued)

diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsix), misrepresentation, or other conduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., s. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills or review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

[12]LOMBARD'S, on July 19, 1984, filed its notice of appeal from this Court's July 18, 1984, judgment of dismissal. That appeal

MEMORANDUM OF LAW

This Court, in its July 18, 1984, judgment of dismissal, noted that LOMBARD'S' Amended Complaint failed to identify an alleged co-conspirator. That failure was also noted by the panel of the Court of Appeals in its decision of February 21, 1985.

(Footnote 12 Continued)

was thereafter assigned Case No. 84-5547 by the Clerk of the United States Court of Appeals for the Eleventh Circuit. On February 21, 1985, a panel of the Court of Appeals affirmed this Court's July 18, 1984, judgment of dismissal. LOMBARD'S, on March 6, 1985, petitioned for rehearing and suggested that the *en banc* Court of Appeals consider LOMBARD'S' petition for rehearing. That petition for rehearing is pending before the Court of Appeals.

In *Lairsey v. Advance Abrasives Company*, 542 F.2d 928 (5th Cir., 1976), an action was brought for personal injuries allegedly caused by the explosion of a grinding wheel. In accordance with Georgia law in effect at the time of the trial, the jury was instructed that the defendant manufacturer was responsible only for its negligence. The jury found for the defendant, the District Court denied a motion for new trial and the plaintiffs filed a timely notice of appeal. Several months after the filing of the notice of appeal, the Supreme Court of Georgia ruled that Georgia allowed actions to be brought under a strict liability theory. While their appeal was pending before the Fifth Circuit, the plaintiffs, citing the Georgia Supreme Court's decision, moved in the District Court under Rule 60(b), Federal Rules of Civil Procedure, for the vacation of the judgment and for a new trial because of a mistake of law. The District Court denied the motion on the ground that a motion to vacate based on a change in decisional law must be filed within the time allowed for perfecting a timely appeal. The plaintiffs requested leave for an interlocutory appeal. In an opinion written by Judge Godbold, the Fifth Circuit held that the plaintiffs' Rule 60(b) motion had been timely filed. Judge Godbold's opinion for the Court of Appeals stated:

On February 26, 1985, Mr. Mitchell M. Lombard, a principal in LOMBARD'S, while attending a sporting goods exhibition in Dallas, Texas, met Mr. Morton M. Finkelstein, one of the owners of Michigan Sporting

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(Footnote 12 Continued)

> "What should a trial court do, in the position of the district court in this case, when a Rule 60(b) motion is filed after appeal has been noticed? Certainly the movant should give notice to the appellate court that the motion has been filed and request that no action be taken on the appeal. As we have previously pointed out, the district court can deny the motion. If inclined to grant the motion, it so indicates and the movant can then apply to the appellate court for remand for the trial court to enter its order . . . These suggestions are not, however, a judicial tightrope to be walked at peril. Where the litigant has timely initiated procedure for relief, he should not be penalized for choice of the 'wrong' procedure. There should be an opportunity for the district court in the first instance to reach the merits of the motion and either deny it, or, if the motion is to be granted, seek authorization to grant it. The court of appeals should be kept informed of what is occurring so that it can take appropriate action with respect to the pending appeal." (Citation and footnote omitted) 542 F.2d at 932.

The decision in *Lairsey v. Advance Abrasives Compant, supra,* is binding in this Circuit under *Bonner v. City of Prichard, Alabama,* 661 F.2d 1206 (11th Cir., 1981). In addition, the *Lairsey* decision was cited with approval in *Parrott v. Wilson,* 707 F.2d 1262, 1267, footnote 8 (11th Cir., 1983), *cert. denied,* ____ U.S., ____ 104 S.Ct. 344.

Accordingly, this Court is authorized to consider LOMBARD'S' motion for relief under Rule 60(b), Federal Rules of Civil Procedure, notwithstanding the pendency of proceedings in the United States Court of Appeals for the Eleventh Circuit.

Goods Distributors, Inc., 2740 29th Street, Grand Rapids, Michigan 49508. According to Mr. Lombard's affidavit, attached hereto as Exhibit 1, Mr. Finkelstein, on February 26, 1985, told Mr. Lombard that in 1983 he, Mr. Finkelstein, had complained to Defendant PRINCE MANUFACTURING INC. ("PRINCE") about the price competition he was receiving from LOMBARD'S and that he asked PRINCE for protection from that price competition.

Attached hereto as Exhibit 2 is a proposed Second Amended Complaint by LOMBARD'S against PRINCE, Paragraph 10 of which alleges:

> "PRINCE, together and with Michigan Sporting Goods Distributors, Inc., and others at this time unknown to LOMBARD'S, conspired to maintain the resale prices of the 'Prince Precision Graphite', the 'Prince J/R Pro' and the 'Prince Magnesium Pro' tennis racquets and terminate price-cutters. In furtherance of that conspiracy with, and in response to complaints from, Michigan Sporting Goods Distributors, Inc., and others unknown, PRINCE has prevented LOMBARD'S from making wholesale and mail order sales of the three (3) new tennis racquets by refusing to fill LOMBARD'S purchase orders from these new tennis racquets."

The allegations of the proposed Second Amended Complaint, LOMBARD'S respectfully submits, are sufficient under Rule 8, Federal Rules of Civil Procedure, and *Monsanto Company v. Spray-Rite Service Corporation*, ____ U.S. ____, 104 S.Ct. 1464 (1984), to

survive a motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure.[13]

Mr. Mitchell M. Lombard's affidavit of March 6, 1984, states that "[O]n February 26, 1985, for the first time, I learned the identity of a retail competitor of Lombard's Inc., which, in 1983, had complained to Prince Manufacturing, Inc., about price competition coming from the mail order sales operation of Lombard's Inc." That statement satisfies the criteria of Rule 60(b)(2), Federal Rules of Civil Procedure.

Based upon the foregoing and the exhibits attached hereto, LOMBARD'S respectfully requests that it be relieved from this Court's judgment of dismissal of July 18, 1984, in this action and that it be granted leave to file the proposed Second Amended Complaint.

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[13]Attached hereto as Exhibit 3 is a copy of the Amended Complaint filed and served in *Spray-Rite Service Corporation v. Monsanto Company*, No. 72 C 12, United States District Court for the Northern District of Illinois, Western Division, reprinted as Appendix 3 in connection with Case No. 82-914, Supreme Court of the United States, reported as *Monsanto Company v. Spray-Rite Service Corporation, supra.* LOMBARD'S' proposed Second Amended Complaint provides PRINCE with as much notice of the antitrust claim being asserted as did the Amended Complaint in *Spray-Rite Service Corporation v. Monsanto Company, supra.*

Respectfully submitted,

HAUSER AND METSCH, P.A.
Attorneys for LOMBARD'S
4770 Biscayne Blvd.
Suite 1070
Miami, Florida 33137-3237
(305) 576-1177

By: _____
LAWRENCE R. METSCH

By: _____
LYDIA A. FERNANDEZ

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion and supporting memorandum of law was mailed this ____ day of March, 1985, to Alan G. Greer, Esq., Floyd Pearson Richman Greer Weil Zack & Brumbaugh, P.A., Attorneys for PRINCE, Twenty-Fifth Floor, One Biscayne Tower, 2 South Biscayne Blvd., Miami, Florida 33131-1868.

_____
LAWRENCE R. METSCH

AFFIDAVIT

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

I, MITCHELL M. LOMBARD, having personally appeared before the undersigned Notary Public, do on my oath depose and state that:

1. I make this affidavit on personal knowledge.

2. I am a principal, director and employee of Lombard's Inc., a Florida corporation, whose executive office is located at: 1840 N.E. 164 Street, North Miami Beach, Dade County, Florida. Lombard's Inc. is and for the past several years has been a dealer in sporting goods and equipment.

3. On Tuesday, February 26, 1985, I was attending a sporting goods exhibition in Dallas, Texas, and met Mr. Morton M. Finkelstein, one of the owners of Michigan Sporting Goods Distributors, Inc., 2740 29th Street, Grand Rapids, Michigan 49508 (telephone number 616-942-2600). Mr. Finkelstein's company is now and has been for several years an authorized dealer for Prince Manufacturing, Inc., a major manufacturer of tennis racquets.

4. During our conversation on Tuesday, February 26, 1985, in Dallas, Texas, Mr. Finkelstein told me that in 1983 he personally complained to Mr. Jim Baugh, the National Sales Manager of Prince Manufacturing, Inc., about the price competition which his company was receiving from the mass merchandisers and the catalog

sales operations. Specifically, Mr. Finkelstein on February 26, 1985, told me that in 1983 he complained to Mr. Baugh and other sales representatives of Prince Manufacturing, Inc., that Lombard's Inc., Nevada Bob's and K-Mart were advertising for sale tennis racquets manufactured by Prince Manufacturing, Inc., at prices which were so low that his company, Michigan Sporting Goods Distributors, Inc., could not economically match them. Further, Mr. Finkelstein told me on February 26, 1985, in 1983 he asked Mr. Baugh for some form of protection from the price competition which his company, Michigan Sporting Goods Distributors, Inc., was then receiving from the catalog sales operations (such as Lombard's Inc. and Nevada Bob's) and the mass merchandisers (such as K-Mart).

5. On February 26, 1985, for the first time, I learned the identity of a retail competitor of Lombard's Inc. which, in 1983, had complained to Prince Manufacturing, Inc., about price competition coming from the mail order sales operation of Lombard's Inc.

_____

MITCHELL M. LOMBARD

Personally appeared before me, the undersigned Notary Public, MITCHELL M. LOMBARD, known by me to be the same, who on his oath executed the following affidavit this ____ day of March, 1985, at North Miami Beach, Dade County, Florida.

_____

Notary Public

My commission expires:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 84-0465-CIV-JLK

LOMBARD'S INC.,
a Florida corporation,

Plaintiff,

vs.

PRINCE MANUFACTURING
INC., a foreign corporation,

Defendant.

SECOND AMENDED COMPLAINT

Plaintiff LOMBARD'S INC. ("LOMBARD'S") sues Defendant PRINCE MANUFACTURING INC. ("PRINCE") and alleges the following:

JURISDICTION

1. This is a complaint for treble damages and injunctive relief under the antitrust laws of the United States, 15 U.S.C. s. 1, et seq. This Court has jurisdiction of this action under 15 U.S.C. ss. 15 and 26 and the action is brought as a result of the Defendant's violations of Section 1 of the Sherman Act, 15 U.S.C. s. 1.

THE PARTIES

2. LOMBARD'S is a corporation organized and existing under the laws of the State of Florida. It maintains its principal place of business in Dade County, Southern District, Florida. LOMBARD'S is engaged in the business of retail, wholesale and mail order sales of sporting goods, including tennis racquets.

3. PRINCE is a foreign corporation with its principal place of business located in Princeton, New Jersey. PRINCE is engaged in the business of manufacturing sporting goods, including tennis racquets, and is found and transacts substantial business in the Southern District of Florida.

4. As further set forth in the succeeding portions of this amended complaint, upon information and belief, PRINCE, together and with PRINCE dealers and others at this time unknown to LOMBARD'S, have engaged, and are now engaging, in an unlawful combination and conspiracy to fix the resale prices of PRINCE tennis racquets and to restrain interstate trade and commerce, in violation of Section 1 of the Sherman Act.

THE FACTS

5. LOMBARD'S operates two (2) retail establishments at which it sells sporting goods, including tennis racquets, to the general public. One (1) such retail establishment is located in Dade County, Florida, and the other retail establishment is located in Broward County, Florida. In addition, LOMBARD'S operates a mail order business in Dade County, Florida, in which it makes retail sales of sporting goods, including tennis

racquets, to customers throughout the United States. Finally, LOMBARD'S sells sporting goods, including tennis racquets, to several mass merchandisers which, in turn, sell those sporting goods, including tennis racquets, to retail customers throughout the United States. LOMBARD'S for many years has sold sporting goods, including tennis racquets, at prices significantly below those suggested by the manufacturers of such sporting goods.

6. PRINCE is engaged in the business of manufacturing sporting goods, including tennis racquets, which are sold throughout the world. Because of its superior design and market skills, PRINCE has achieved a commanding position in the sporting goods field, particularly in the highly profitable market for so-called "oversized" tennis racquets.

7. For several years, LOMBARD'S has purchased large quantities of tennis racquets from PRINCE for resale in LOMBARD'S' retail, wholesale and mail order business operations. The importance to LOMBARD'S of its tennis racquets manufactured by PRINCE has grown over the last several years to the point where LOMBARD'S generates a substantial portion of its profits from sales of such tennis racquets. If LOMBARD'S were to find itself unable to sell the tennis racquets manufactured by PRINCE, the ability of LOMBARD'S to survive would be severely jeopardized.

8. Effective January, 1984, PRINCE introduced two (2) new tennis racquets to the public. The first such tennis racquet, named the "Prince Precision Graphite," is being offered and sold to dealers, such as LOMBARD'S,

at a price of $80.00 each, with a suggested retail price of $135.00 each. The second such tennis racquet, named the "Prince J/R Pro," is being offered and sold to dealers, such as LOMBARD'S, at a price of $29.50 each, with a suggested retail price of $49.50 each. In March, 1984, PRINCE introduced a third new tennis racquet to the public. The third such tennis racquet is named the "Prince Magnesium Pro."

9. PRINCE has asked LOMBARD'S to enter into a written agreement, a copy of which is attached hereto as Exhibit "A", whereby LOMBARD'S would contractually bind itself to make no sales of the "Prince Precision Graphite" tennis racquet and/or the "Prince J/R Pro" tennis racquet and/or the "Prince Magnesium Pro" tennis racquet other than through the retail establishments operated by LOMBARD'S. The clear purpose of the proposed written agreement is to prevent LOMBARD'S from selling the specified tennis racquets through the mail order and/or wholesale operations of LOMBARD'S. LOMBARD'S has refused to sign the proposed written agreement and PRINCE has refused to fill written and/or verbal purchase orders for the three (3) new tennis racquets submitted by LOMBARD'S solely because LOMBARD'S has refused to sign the proposed written agreement.

10. PRINCE, together and with Michigan Sporting Goods Distributors, Inc., and others at this time unknown to LOMBARD'S, conspired to maintain the resale prices of the "Prince Precision Graphite," the "Prince J/R Pro" and the "Prince Magnesium Pro" tennis racquets and terminate price-cutters. In furtherance of that conspiracy with, and in response to complaints from, Michigan Sporting Goods Distributors, Inc. and others

unknown, PRINCE has prevented LOMBARD'S from making wholesale and mail order sales of the three (3) new tennis racquets by refusing to fill LOMBARD'S' purchase orders for these new tennis racquets.

11. LOMBARD'S has already suffered great injury to its business, good will, reputation, and relationship with past and future customers because it has been unable to purchase from PRINCE the "Prince Precision Graphite," the "Prince J/R Pro" and the "Prince Magnesium Pro" tennis racquets on terms and conditions which do not violate Section 1 of the Sherman Act. Should LOMBARD'S, in the future, be unable to purchase from PRINCE the "Prince Precision Graphite," the "Prince J/R Pro" and the "Prince Magnesium Pro" tennis racquets on terms and conditions which do not violate Section 1 of the Sherman Act, it will suffer additional injury to its business, good will, reputation and relationship with past and future customers. The public has already been harmed and will, in the future, continue to be harmed, by the above-described unlawful policies and practices of PRINCE because competition throughout the United States will be suppressed or eliminated.

12. As a direct result of the above-described unlawful acts by PRINCE, LOMBARD'S has already suffered, and will continue to suffer, substantial damages.

13. LOMBARD'S has no adequate remedy at law.

14. LOMBARD'S demands trial by jury of all issues so triable.

WHEREFORE, LOMBARD'S prays:

A. That a preliminary and permanent injunction issue restraining PRINCE from conditioning its sales of the "Prince Precision Graphite" and/or the "Prince J/R Pro" and/or the "Prince Magnesium Pro" tennis racquets to LOMBARD'S upon the execution by LOMBARD'S of the proposed agreement, a copy of which is attached hereto as Exhibit "A".

B. That a preliminary and permanent injunction issue restraining PRINCE from in any manner restricting or limiting their sales of the "Prince Precision Graphite," the "Prince J/R Pro" and/or the "Prince Magnesium Pro" tennis racquets to LOMBARD'S for reasons or motives which violate Section 1 of the Sherman Act.

C. That LOMBARD'S recover from PRINCE treble damages, plus costs and counsel fees.

D. That LOMBARD'S have such further and other relief as is just and proper.

HAUSER AND METSCH, P.A.
Attorneys for LOMBARD'S
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was delivered to Alan G. Greer, Esq., and Scott D. Sheftall, Esq., Floyd Pearson Stewart Richman Greer Weil & Zack, P.A., Attorneys for PRINCE, One Biscayne Tower, 25th Floor, Miami, Florida 33131-1868 this ____ day of May, 1984.

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LYDIA A. FERNANDEZ

Section 1254 of Title 28, United States Code, 28 U.S.C. s 1254:

> "Courts of appeals; certiorari; appeal; certified questions
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> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
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> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
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> "(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;
>
> "(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy"

Section 1 of the Sherman Act, as amended, Section 1 of Title 15, United States Code, 15 U.S.C s 1:

"Trusts, etc., in restraint of trade illegal; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, as amended, Section 15 of Title 15, United States Code, 15 U.S.C. s 15:

"Suits by persons injured; amount of recovery

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 26 of Title 15, United States Code, 15 U.S.C. s 26:

"Injunctive relief for private parties; exception; costs

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may isse: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.